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No. 87-2051

In The

Supreme Court of the United States

October Term, 1987

M.J.R., INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Is an ordinance which prohibits the operation of a lawful business which presents sexually oriented, nonobscene entertainment, by any person who has been previously convicted of an obscenity offense or certain other crimes, or whose spouse has been so convicted, an unlawful prior restraint, as condemned in *Near v. Minnesota*, 283 U.S. 697 (1931) and as suggested in *Arcadia v. Cloud Books, Inc.*, 478 U.S. 697 (1986(?

2. Is a municipal ordinance which requires a license before one may engage in protected expression, and whivch fails to provide the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965) after denial or revocation of a license, an unlawful prior restraint?

3. Is a zoning ordinance which forces the closure of 100% of a city's adult cabarets, and 92% of all adult businesses, subject to strict scrutiny under *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), or to the deferential standard of review allowed for prospective zoning regulations in *City of Renton v. Playtine Theaters, Inc.*, 475 U.S. 41 (1986)?

4. Does an ordinance restricting adult cabarets to mostly industrial, poorly lit, unsafe areas where economic survival is virtually impossible, thus drastically reducing the number of adult cabarets, violate the requirement of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) that a

city must refrain from denying such businesses a reasonable opportunity to open and operate?

5. May a city, through zoning, close every adult cabaret in the city, even though they had been operating lawfully for many years while causing no adverse secondary effects, or must the ordinance apply to new businesses only, as indicated in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)?

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REASONS WHY THE WRIT SHOULD BE GRANTED

Respondent[1] begins its Brief in Opposition with the following statements:

> Petitioners' statement of the case substantially and materially misrepresents the facts of this case. Petitioners have stated as matters of fact, without citation to the record, numerous unproven allegations for which there are no findings by the trial court.

Respondent then identifies facts which it claims are misrepresentations: 1) that the adult cabarets in Dallas have caused no deleterious effects on neighborhoods; 2) that the Dallas ordinance will force every adult cabaret to close; and 3) that the areas available to adult cabarets are so poor as to make it impossible for more than a few of these businesses to survive. Respondent does not cite to anything in the record below that would establish any misrepresentation, nor does Respondent claim that the facts alleged by Plaintiff are incorrect. Respondent only claims that the record has been misrepresented.

As this Court said in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984):

> . . . in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to

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[1] These Petitioners sued only the City of Dallas in the trial court, and did not name any other party as a respondent in this Court. Accordingly, Petitioners believe the City of Dallas is the only Respondent in this case.

> make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." [Citatations omitted].

Therefore, the trial court's failure to make certain factual findings does not affect an appellate court's obligation to examine the entire record. That record includes the transcripts of the hearings before the City Plan Commission (Defendant's Exhibit 1 in the trial court) and the City Council (Defendant's Exhibit 17). This is the only record before the Dallas city government to support the enactment of an ordinance which impacts significantly on rights which are guaranteed by the First Amendment.

The Plan Commission transcript is 60 pages long, and there is not a single mention of adult cabarets. No witness, no Commissioner, no Council member, no one suggested that any adult cabaret in the city had ever caused any deleterious effects. The trial court made no finding that they had caused any problems. In fact, the court pointed out the lack of such evidence to the City.[2] The City did not claim any such evidence existed, nor disagree with the court's observation that there was no evidence in the record, but instead responded by saying that it had looked at the Austin, Indianapolis and Los Angeles studies for evidence of negative impact of adult cabarets.[3] Thus, Petitioners have not misrepresented the record

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2 The trial court's statements appear on p. 132 of the transcript of the hearing on cross-motions for summary judgment.

3 This representation to the trial court was inaccurate, and is the only basis in the record for the statement of the District Court, 648 F. Supp. at 1064, and the Court of Appeals, 837 F.2d at 1300, that the City examined studies done by

in stating that there is no evidence that adult cabarets have caused any deleterious effects in Dallas.

Secondly, the evidence in the trial court was overwhelming that the vast majority of locations left available for adult businesses were in primarily industrial zones, with high crime rates, unlit and unsafe streets, and no retail activity. The trial court even acknowledged, in the hearing on cross-motions for summary judgment, that the female customers of one Petititioner would not be willing to travel to those locations at night, thus probably dooming that business to bankruptcy.[4]

The City presented evidence that a few of the available locations were in good retail areas, suitable for nightclubs. The City has never claimed that there would not be drastic reduction, or even complete elimination, of adult cabarets as a result of the ordinance. The City has never challenged the claim that approximately 110 of the 120 adult businesses in Dallas would have to close.[5] The Petitioners argued that the

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other communities.

As the record below clearly shows, in the words of the City Attorney speaking to the Plan Commission (Defendant's Exhibit 17, at p. 3), the City only looked at the Austin study, which contained "summaries" of the other two studies. Interestingly, the Los Angeles study focused on bookstores and theaters only, not adult cabarets. The Indianapolis study concluded that there was no demonstrable cause-and-effect link between adult businesses and crime in the areas near those businesses.

4 Transcript of summary judgment hearing, at 114.

5 This fact is established by the Dallas zoning map introduced by Plaintiffs, with overlays showing the effect of the distance restrictions of the ordinance. That map establishes beyond argument that the ordinance eliminates almost every adult business in the City.

vast *majority* of the locations were in industrial zones. The City never argued to the contrary, but instead took the position that economic viability was totally irrelevant, under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).[6] The court's position was that there was land available to open adult businesses in the City of Dallas, and that was the only inquiry it was entitled to make under *Renton*. The court never questioned whether the First Amendment would be violated if the result of the ordinance's enforcement was a major reduction of adult businesses.[7]

Therefore, Petitioners' statements as to the types of locations available for them neither misrepresents the record nor conflicts with the holdings below.

The third example given by Respondent of misrepresentation is Petitioners' claim that the ordinance would close every adult cabaret in the City. After a thorough re-examination of every item in the record below, it is Petitioners'

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6 As lead counsel for the City told the trial judge: "In any event, the Plaintiffs' witnesses say no, there is not adequate sites available for relocation of these businesses because they're economic problems with them, they would not be good business ventures, there are lease problems and what not. And I would submit to the Court that's all well and good but it doesn't matter. It's totally irrelevant to the inquiry in this case." Transcript of summary judgment hearing, at 11.

7 This Court has never required the actual deprivation of First Amendment rights as a prerequisite to judicial relief. Yet, the decision in this case, ignoring the consequences of the ordinance, is that no relief will be available to pre-existing businesses until after their First Amendment rights have been eliminated. Would the adult cabarets be entitled to relief if in two, or five, or ten years if only one or two had found new locations?

representation to this Court that the record establishes the following:

There were 120 adult businesses operating in the City at the time the ordinance was enacted[8] The ordinance will require the closure of approximately 110 of those businesses.[9] Every single adult cabaret plaintiff faces closure by the ordinance.[10] And the trial court was informed by plaintiffs' counsel that the ordinance would require every one of the City's twenty-nine adult cabarets to close.[11]

In any event, the trial court's ruling took no notice of the number of adult businesses closed by the ordinance; obviously, therefore, it was not concerned with the number of adult cabarets closed. It is this fact which makes this case so appropriate for review by this Court.

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8 Plaintiffs' Exhibit 3 (affadavit of Patrick M. Stewart) at 8; Plaintiffs' Exhibit 1 (map).

9 Plaintiffs' Exhibit 1; Plaintiffs' Exhibit 3, at 7-8. In the Petition for Writ of Certiorari, at 4, Petitioners represented that "about 110 [adult businesses] will have to close their doors."

10 Plaintiffs' Statement of Business Histories and Statement of Impact of Chapter 41A on Plaintiffs' Businesses, filed below pursuant to an order of the trial court.

11 It is this fact which is open to challenge. In reviewing the record in order to prepare this Brief, counsel discovered that the list of adult cabarets, by name and address, was inadvertently omitted from the map, Plaintiffs' Exhibit 1, when it was introduced. Counsel apologizes for the oversight, which occurred because the parties had less than two months from the filing of the initial Complaint until final judgment in which to prepare this very difficult and complex case.

Nevertheless, this fact can be established by the map in evidence, and judicial notice of the public records of the City of Dallas. Each adult cabaret has had to file a license application, showing its address. By locating the addresses on the map, the extent of the impact of the ordinance on the cabarets is clear.

CONCLUSION

Contrary to Respondent's assertions in its Brief, this case is not controlled by *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), a decision which approved a zoning ordinance with prospective appliation only, and did not force the closing of a single adult business. Instead, the zoning portion of the Dallas ordinance presents a major, and as yet undecided, constitutional issue to this Court, an issue which will affect hundreds of cities, thousands of adult businesses, and millions upon millions of patrons of those businesses, across the entire United States. At this point in time, there is an apparent conflict on the issue between the circuits, and the instant case is in apparent conflict with two prior decision of this Court. On these bases, it is imperative that this Court grant review of this case.

Respectfully submitted,

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